UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TREVOR BENNETT, Appellant, v. NATIONAL GALLERY OF ART, Agency.	)	DOCKET NUMBER CB-7121-97-0040-V-1 DATE: JUL 28, 1998

Ralph L. Wright, American Federation of Government Employees, Local 1831, Washington, D.C., for the appellant.

Luis Baquedano, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Member Marshall issues a dissenting opinion.

OPINION AND ORDER

This case is before the Board upon the appellant's timely request for review of the February 19, 1997 arbitration decision that sustained the agency's action removing him from his position. For the reasons set forth below, we GRANT the appellant's request and SUSTAIN the arbitration decision.

BACKGROUND

The agency removed the appellant from his GS-4 Guard position at the National Gallery of Art (Gallery or agency), Washington, D.C., based on the following reasons: (1) Fighting on agency premises while on duty on July 23, 1995 (which the agency alleged followed a verbal confrontation between the appellant and Government Police Officer (GPO) George Caldwell, during which the appellant lunged at Caldwell, attempted to punch him, and threw a book at him, hitting him); (2) rudeness towards Gallery visitors on July 22 and 23, 1995 (allegedly failing to provide, on July 22, adequate assistance to a visitor who asked for directions to the elevators and being discourteous, thereby forcing the visitor, who was recovering from a broken ankle, to climb the stairs when she could not locate the elevators, and by ignoring another visitor's requests for directions on July 23); (3) using threatening words to other persons on July 23, 1995 (allegedly threatening to beat up Caldwell); and (4) threatening a co-worker with physical harm on July 23, 1995 (allegedly stating to GPO Richard Bock, who provided a statement concerning the alleged fight with Caldwell, "Well, you had better dig two holes, for you and me," and warning Bock to stay out of the matter). Request for Review File (RFR) File, Tab 3, Subtab 19 at 1-4; *see also id.*, Subtab 17. In proposing the appellant's removal, the agency took into consideration a July 7, 1995 letter of reprimand issued to him for threatening "another Guard Force member." RFR File, Tab 3, Subtab 19 at 5.

The appellant appealed his removal under the terms of the negotiated grievance procedure. When the parties were unable to resolve the matter through the steps of the negotiated grievance procedure, the appellant appealed his removal to arbitration.[1] Before the arbitrator, the appellant denied the charges

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[1] The appellant's and Caldwell's grievances were consolidated for arbitration. *See* RFR File, Tab 1 and Tab 3, Subtab 4. The matter involving Caldwell, who

and argued that the evidence upon which the agency relied to support its reasons for his removal was based on hearsay. *See* RFR File, Tab 1 and Tab 3, Subtab 4, Arbitration Decision (AD) at 1, 9-12. Following a hearing, the arbitrator found that the agency's reasons were supported by preponderant evidence and denied the appellant's grievance. AD at 9-12, 13-33, 37.

In his request for review, the appellant reargues the merits of the case, contending, inter alia, that the arbitrator erred by: (1) Denying him a fair hearing; (2) demonstrating bias in favor of the agency; and (3) disallowing testimony and documentary evidence, including allegedly new evidence of disparate treatment, and failing to consider "disparate treatment" as a penalty factor in this case. RFR File, Tabs 1 and 5, Request for Review at 1-15. The agency has timely responded in opposition to the request for review, contending that the Board lacks jurisdiction to review the arbitration decision because the appellant did not raise an allegation of prohibited discrimination at any time in the matter. RFR File, Tab 3.

In view of the agency's motion to dismiss and the appellant's failure to allege a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), even though he alleged disparate treatment, the Board, in a July 29, 1997 order, directed the appellant to show cause why his request for review should not be dismissed for lack of jurisdiction. RFR File, Tab 4. The appellant timely responded to the show-cause order, alleging discrimination based on national origin (Jamaican). *Id.*, Tab 5 at 1-2. The agency has timely replied in opposition to the appellant's response. *Id.*, Tabs 6-7.

ANALYSIS

The appellant's request for review is within the Board's jurisdiction.

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received a 2-day suspension, is not before the Board. *See* RFR File, Tab 1 and Tab 3, Subtab 4, Arbitrator's Award at 33-37.

The appellant does not raise the issue of whether the Board has jurisdiction over his request that we review the arbitrator's decision. However, the Board recently issued two arbitration-review decisions that appear to lead to different jurisdictional outcomes when applied to this case. In *Colon v. Department of Veterans Affairs,* 73 M.S.P.R. 659 (1997), the Board found that it had jurisdiction over a request for arbitration review where the appellant made only "bare claims" of discrimination that were unsupported by any factual assertions. *Id.* at 666. Applying *Colon* to this case would lead to a finding of jurisdiction. In *Lepusic v. U.S. International Trade Commssion,* 74 M.S.P.R. 359 (1997), the Board found that it did not have jurisdiction over the appellant's request for arbitration review because the appellant failed to allege facts which, if true, would establish a prima facie case of discrimination. *Id.* at 361. Applying *Lepusic* to this case would seemingly lead to a finding that the Board lacks jurisdiction. Moreover, neither *Lepusic* or *Colon* discuss each other. Therefore, we *sua sponte* address the seeming inconsistency between those two decisions.

Under 5 U.S.C. § 7121(d), "[a]n aggrieved employee affected by a prohibited personnel practice under [5 U.S.C. §] 2302(b)(1)" may "request [the Board] to review the final [arbitration] decision pursuant to [5 U.S.C. §] 7702 ... in the case of any personnel action that could have been appealed to the Board[.]" Section 7702(a)(1) provides that, "in the case of any employee or applicant for employment who" appeals an action under, inter alia, 5 U.S.C. chapter 75 and who "*alleges* that a basis for the action was discrimination ... the Board *shall* ... *decide* both the issue of discrimination and the appealable action[.]" (Emphasis added.) Subsections 7702(a)(3) and (b)(1) provide that an appellant who receives a Board "decision" under subsection(a)(1) may petition the Equal Employment Opportunity Commission (EEOC) "to consider the decision" or file an action in

court to review "the decision." The statute further provides that EEOC "may refer the case to the Board, or provide on its own, for the taking ... of additional evidence to the extent it considers necessary to supplement the record." 5 U.S.C. § 7702(b)(4).

The Board has held that, under 5 U.S.C. § 7121(d), it has the authority to review an arbitration decision where an appellant alleges that he has been affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), the subject matter of the grievance is one over which the Board has jurisdiction, and a final arbitration decision has been issued in the matter. *Colon v. Department of Veterans Affairs*, 73 M.S.P.R. 659, 662 (1997); *see also Gomez v. Social Security Administration*, 70 M.S.P.R. 257, 261 (1996); *Hayes v. Department of Labor*, 65 M.S.P.R. 214, 217 (1994); *Bean v. Equal Employment Opportunity Commission*, 55 M.S.P.R. 609, 612 (1992). Although the appellant did not specifically raise his claim of discrimination based on national origin before the arbitrator, an appellant may raise a claim of discrimination for the first time on review of an arbitration decision under 5 U.S.C. § 7121. *Colon*, 73 M.S.P.R. at 663.

In *Colon*, 73 M.S.P.R. at 659, 662, the appellant requested review of an arbitration decision. The Board found that "she also appear[ed] to argue [for the first time] that she requested and did not receive 'reasonable accommodation,' possibly suggesting a claim of disability discrimination." *Id*. at 666. The Board found that it had jurisdiction over the request for review based on the appellant's "bare claims" of discrimination that were unsupported by factual assertions. *Id*.

In *Lepusic v. U.S. International Trade Commission*, 74 M.S.P.R. 359, 361 (1997), appellant Lepusic's case was part of a consolidation in which the appellants therein claimed before the arbitrator sex and race discrimination based on disparate treatment in their reduction in force (RIF) and reiterated the disparate treatment claim before the Board in their request for review of the arbitrator's

decision. The Board found that appellant Lepusic did not allege "that he specifically was discriminated against in connection with his separation by RIF or was otherwise affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1)." Thus, the Board found that it lacked jurisdiction over appellant Lepusic's request for review because he failed to allege facts which, if true, would establish a prima facie case of discrimination. *Lepusic*, 74 M.S.P.R. at 361.

Section 7702 does not, however, distinguish between frivolous and nonfrivolous allegations or between facts sufficient to support a prima facie case of discrimination and facts insufficient to support a prima facie case of discrimination. The statute also does not distinguish between Board decisions which would find that a discrimination claim is frivolous and decisions in which the Board would find that the appellant has made allegations sufficient to establish a prima facie case of discrimination.

A review of the legislative history of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978), as amended, Pub. L. No. 96-54, 93 Stat. 381 (1979), codified in pertinent part at 5 U.S.C. § 7702, reveals no congressional intent as to such distinctions. The section-by-section analysis of the Senate Report on the CSRA refers, with respect to section 7702, to "actions appealed to the Board involving allegations of discrimination[.]" S. Rep. No. 95-969, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2785. The Senate Report also provides that, under the civil service reform procedures --

> the Board will continue to consider all actions appealable under the other provisions of this bill, even if the appeal also involves issues of discrimination. This will allow the Board to consider, as related aspects of the same case, allegations that there had been violations of the merit system principles implemented by title V, as well as the anti-discrimination laws. In such cases, questions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question which must be considered together.

Id. at 2775. Further, the Senate Report provides that, when an agency takes an action that is appealable to the Board --

> the employee must appeal the action to the Board if it [sic] wishes any administrative review of the agency action.... The appeal must be to the Board whether the employee[] alleges only that the agency action was unlawful under the laws prohibiting discrimination, or the employee alleges only that the procedural and substantive protection afforded him under the personnel laws in title V were violated, or he alleges a violation of any combination of these different laws. The Board has jurisdiction whether the employee raises the discrimination laws as a defense or answer to the agency action, or whether the employee files a separate complaint against his employer under the anti-discrimination laws for proposing to take the appealable action against him.
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> ....
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> *The jurisdiction of the Board is determined entirely by the nature of the personnel action taken, not by the kind of legal or factual arguments raised or the procedures used to raise the discrimination issue*.

Id. at 2778 (emphasis added). The Senate Report notes that "discrimination complaints involving employees outside the Federal government are now considered by U.S. District Courts," and that, "[t]o encourage uniformity in judicial decisions in this area both kinds of cases should continue to be considered by the U.S. District Court." *Id*. at 2785.

In *Christo v. Merit Systems Protection Board*, 667 F.2d 882, 883-85 (10th Cir. 1981), the court, in discussing the legislative history of the CSRA, found that, where a case before the Board involves any claim of discrimination, Congress intended that the employee have a right of review before EEOC and/or the district court if he or she wishes to pursue the allegation that the adverse action was the result of discrimination. Thus, the legislative history of the CSRA indicates that Congress was aware that non-Federal employees can file discrimination actions in district court, and intended that Federal employees

should have the same right when they allege discrimination in any action appealable to the Board.

The House Conference Report on the CSRA states that --

> [i]n all mixed cases, that is, cases involving any action that could be appealed to the [Board] and which involve an allegation of discrimination, the [Board] will hold hearings and issue a decision on both the issue of discrimination and the appealable action.... The term 'decision' as used throughout this section includes any remedial order the agency or panel [Special Panel] may impose under law.

H. Rep. No. 95-1717, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2873. The legislative history of the CSRA sheds no light on congressional intent as to what would constitute an "allegation" of discrimination, and sheds no further light on what would be considered a Board "decision" on a claim of discrimination, as those terms are used in section 7702. Subsequent amendments to the CSRA -- *see* Pub. L. No. 96-54, 93 Stat. 381, 382-85 (1979)-- made mere technical changes to section 7702 and likewise provide no guidance regarding such congressional intent. *See* S. Rep. No. 96-276, *reprinted in* 1979 U.S.C.C.A.N. 931, 934.

Consistent with the statute, the Board has treated entitlement to notice of mixed-case appeal rights as a *substantive* right, even where a discrimination claim is found to be frivolous or insufficient to establish a prima facie case, thus expressing the Board's view that an appellant is entitled to seek EEOC and district court review of his discrimination claim no matter the extent to which the claim appears to lack merit. Thus, where an appellant has merely alleged discrimination or has failed to state facts which, if proven, would establish a prima facie case of discrimination, and the administrative judge did not provide notice of mixed-case appeal rights, the Board has provided notice of mixed-case appeal rights so that the appellant's "substantive rights" would not be prejudiced. *See, e.g., McClain v. Office of Personnel Management*, 76 M.S.P.R. 230, 242-43 (1997); *Johnson v. Office of Personnel Management*, 61 M.S.P.R. 293, 295 (1994); *Miller v. Office of Personnel Management*, 59 M.S.P.R. 539, 545 (1993);

Bonggat v. Department of the Navy, 56 M.S.P.R. 402, 412-13 (1993); *Masiclat v. Office of Personnel Management*, 56 M.S.P.R. 204, 206-07 (1993); *Bisarra v. U.S. Postal Service*, 52 M.S.P.R. 203, 205 (1992); *Clopton v. Office of Personnel Management*, 40 M.S.P.R. 296, 298 (1989).

We note that in *Hill v. Department of the Air Force*, 796 F.2d 1469, 1471 (Fed. Cir. 1986), the Court of Appeals for the Federal Circuit (Federal Circuit), for purposes of deciding its jurisdiction in that appeal, held that the case was not a mixed case because the Board found that the appellant had not made a nonfrivolous allegation of discrimination. We find that *Hill* is not dispositive of whether an appellant before the Board is entitled to mixed-case appeal rights if he fails to make a nonfrivolous allegation of prohibited discrimination. In this regard, we note that the court was addressing its own jurisdiction and whether, under 28 U.S.C. § 1631, Congress intended an appellant to manipulate "appellate jurisdiction by the mere mention of discrimination." *Id*. The Board, however, is here concerned, not with what Congress intended under 28 U.S.C. § 1631, but what it intended under 5 U.S.C. § 7702. Further, there is no indication in *Hill* that the court considered the legislative history of section 7702 or that it considered the plain statutory language allowing employees who allege discrimination to elect to seek review either in the Federal Circuit if they do not wish to pursue their discrimination claims, or before EEOC or a Federal district court if they do. Once an appellant has been given that choice and he chooses the Federal Circuit, he may very well be unable to have his case transferred to a district court, as indicated in *Hill*, but this does not mean that the Board should not notify him of his statutory review rights.

In fact, in *Jones v. Department of the Navy*, 898 F.2d 133, 134-35 (Fed. Cir. 1990), the court held that, under 5 U.S.C. § 7121(d), the Board is required to consider a discrimination claim even if it was not raised during arbitration and is raised for the first time before the Board. In *Jones*, 898 F.2d at 134, the appellant

alleged for the first time, in his Board appeal, "that the agency failed to consider the medical reasons which caused his frequent absences" and that "he had been discriminated against by [agency] management 'because they overruled qualified medical doctors.'" The court stated that, "under 5 U.S.C. §§ 7121(d), [sic] and 7702 an aggrieved employee who is affected by [a] prohibited personnel practice ... as defined in 5 U.S.C. §§ 2302(b)(1) and 7702, which is covered by a negotiated grievance procedure, and who has contested the action of the agency through arbitration proceedings ... has an absolute right to request the [B]oard to review the arbitrator's decision." *Jones*, 898 F.2d at 134. The court found that "5 U.S.C. § 7702 provides that *notwithstanding any other provision of law*, an aggrieved employee may appeal to the [B]oard when he alleges that a basis for the agency action was prohibited discrimination" and that "the [B]oard is *required* to decide the issue of discrimination" within the statutory time limit." *Id*. at 135 (emphasis in original). The court made no distinction between frivolous and nonfrivolous allegations of discrimination before the Board's jurisdiction would attach in its review of arbitration cases under 5 U.S.C. § 7121(d).

We note that EEOC appears to be in accord with the proposition that an employee whose allegations of discrimination are not nonfrivolous is nevertheless entitled to notice of his statutory review rights. In this regard, we note that EEOC has accepted within its jurisdiction cases in which the Board has found that a discrimination claim was frivolous but nevertheless provided notice of mixed-case appeal rights. *See, e.g., Andrews v. Runyon*, EEOC Petition No. 03970032 (June 6, 1997). Further, where the Board has struck allegations of discrimination as frivolous, EEOC will nevertheless review the record under the CSRA and its regulations at 29 C.F.R. § 1614.303 et seq. to determine whether it supports the Board's determination. *See Andrews*, No. 03970032 at 1; *Harmon v. Runyon*, EEOC Petition No. 03960125 at 1 (Mar. 17, 1997). If EEOC finds that the record supports the Board's determination, it will concur with the Board's decision. *See*,

e.g., *Minehan v. West*, EEOC Petition No. 03970092 (Nov. 12, 1997). If EEOC finds that the record does not support the Board's determination, it will refer the case back to the Board for the taking of additional evidence pursuant to 29 C.F.R. § 1614.305(d). *See Andrews*, No. 03970032 at 2-3. EEOC may also concur with the Board's decision in part and refer the case back to the Board for the taking of additional evidence on the Board discrimination findings with which it disagrees. *See Harmon*, No. 03960125 at 1-3.

Conversely, the EEOC has denied review where the Board found the allegations of discrimination to be frivolous and did not provide notice of appeal rights to EEOC. *See, e.,g., MacTaggart v. West*, EEOC Petition No. 03970080 (July 17, 1997). Thus, a Board determination not to provide an appellant with notice of mixed-case appeal rights where the appellant has failed to make nonfrivolous allegations of discrimination may deprive the appellant of EEOC and district court review.

Thus, we find, based on the discussion above, that there is nothing in the plain language of 5 U.S.C. § 7702, which is referenced in 5 U.S.C. § 7121(d), or in the legislative history of the CSRA and its amendments to suggest that an appellant must make a nonfrivolous allegation of discrimination before the Board in order to be entitled to EEOC and district court review. Further, neither the Federal Circuit's decision in *Jones* nor its decision in *Hill* found such a requirement. In addition, as discussed above, EEOC grants review even where the Board has found that an appellant's allegation of discrimination was frivolous, provided that the Board notifies the appellant of EEOC appeal rights.

We therefore hold that the Board has jurisdiction to review an arbitration decision in any case in which an appellant alleges discrimination prohibited by 5 U.S.C. § 2302(b)(1), irrespective of whether the appellant makes a nonfrivolous allegation of discrimination, and which otherwise meets the jurisdictional requirements for consideration of an arbitration decision under *Colon*, 73

M.S.P.R. at 663. Thus, to the extent that *Lepusic* and any other Board decisions hold to the contrary, they are hereby overruled.[2]

Accordingly, we find that the Board has jurisdiction to review the arbitrator's decision in this case under *Colon* because: The Board otherwise has jurisdiction over the underlying subject matter of the grievance, i.e., a removal action, under 5 U.S.C. §§ 7512(1) and 7513(d); a final arbitration decision has been issued; and the appellant alleges discrimination based on national origin, a prohibited personnel practice under 5 U.S.C. § 2302(b)(1). *See Colon*, 73 M.S.P.R. at 662-63.

The record does not establish that the arbitrator erred in interpreting civil service law, rule, or regulation in this case.

Arbitration decisions are entitled to a greater degree of deference than initial decisions by the Board's administrative judges. *Benson v. Department of the Navy*, 65 M.S.P.R. 548, 554 (1994); *Bean*, 55 M.S.P.R. at 612. Thus, the Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Benson*, 65 M.S.P.R. at 554; *Hayes*, 65 M.S.P.R. at 217; *Bean*, 55 M.S.P.R. at 612. Thus, if after reviewing the facts of a case, the Board would disagree with the arbitration decision, the Board will not, absent legal error, substitute its conclusions for the arbitrator's. *Benson*, 65 M.S.P.R. at 554.

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[2] The appellant alleged discrimination, claiming that he is Jamaican and stating that he is "raising the issue of discrimination based on his national origin." *See* RFR File, Tab 5. The Member asserts in her dissent that the appellant's allegations cannot "reasonably be construed as an 'allegation of discrimination.'" Dissent at 1. The appellant has expressly claimed discrimination. Although that claim, when "reasonably construed," may be frivolous for the reasons set forth in the Member's dissent, the statute does not distinguish between frivolous and nonfrivolous allegations of discrimination.

The Agency's Reasons

With respect to the merits of the agency's reasons for removing the appellant, the arbitrator set forth the correct standard of proof to be applied. He stated that the agency was required to show by preponderant evidence that the employee committed the charged misconduct, that discipline of the employee would promote the efficiency of the service, and that the penalty imposed was "appropriate." AD at 13. The arbitrator's findings regarding the agency's stated reasons for its actions were based on the testimonies of witnesses and their written statements.

Regarding reason one, fighting on agency premises while on duty, the arbitrator considered the testimony of GPO Bock that, following a verbal argument in which Caldwell accused the appellant of rudeness, the appellant threatened to punch Caldwell in the mouth, that Caldwell pushed the appellant, and that, after the appellant was being restrained by other officers and led away from Caldwell, the appellant threw a small book at Caldwell, hitting him. The arbitrator considered Bock's testimony that he did not consider the incident to be a fight. He also considered, inter alia, the testimony of Lieutenant Dona Lindner that the appellant told her immediately following the incident that he "had made a 'move' for Caldwell" and had thrown a book at him, hitting him, that Officers Dexter Roberson, Andre Johnson, and Marvin Mallard made oral statements to her that corroborated Bock's statement, and that these three officers' oral statements were more responsive than their written statements. The arbitrator considered these three officers' testimonies, as well as the appellant's and Caldwell's testimonies, that there was no physical contact between the appellant and Caldwell. The arbitrator noted that the witnesses provided conflicting accounts of the incident. In resolving the conflict, he found that the witnesses' written statements corroborated Bock's report of the incident and his testimony. Thus, the arbitrator found that the agency proved by preponderant evidence that the

appellant engaged in fighting on agency premises while on duty and that he used threatening words to Caldwell during the altercation. AD at 13-22.

With respect to reason two, rudeness towards Gallery visitors, the arbitrator considered Lieutenant Richard Allen's testimony that the visitor complained to him as charged in the removal proposal notice. The arbitrator noted the testimonies of Officers Johnson and Cleve Dennis, who were called by the appellant to show that they fit a description similar to the appellant's and that the appellant could have been mistaken for the Guard involved in the incident. The arbitrator found, however, that these witnesses' testimonies indicated that neither of them fit the appellant's description and neither was close to the area in which the incident allegedly occurred. The arbitrator found that the incident described in this reason was similar to an incident described in an earlier March 18, 1995 complaint of record made by a visitor that the appellant was "gruff" to visitors and failed to courteously provide them assistance. Therefore, the arbitrator found that the agency supported this reason by preponderant evidence. AD at 22-27.

As to reason three, threatening a co-worker with physical harm, the arbitrator considered Bock's testimony that, when he went to relieve the appellant for a break on the same day following the altercation with Caldwell, the appellant accused Bock of being "two-faced" and of involving himself in a matter that did not concern him, and, in the course of his exchange with Bock, made the statement to Bock regarding the digging of the two holes. The arbitrator further considered Bock's testimony that he regarded the appellant's statement as a threat of physical harm, meaning that someone would be buried, that he took the statement seriously inasmuch as he had earlier observed the appellant's display of "rage" in his altercation with Caldwell, and that Bock was so concerned with the appellant's statement that he reported it to his own supervisor, Lindner, who directed the appellant to provide a written statement of the incident. The arbitrator rejected the appellant's argument that the statement regarding the

digging of two holes was a reference to Psalm 35 of the Bible. He concluded that the agency proved by preponderant evidence that the appellant made a threatening statement. AD at 27-29.

Finally, as to reason four, rudeness towards Gallery visitors, the arbitrator considered Bock's testimony that, on July 23, 1995, while climbing the stairs next to the Small Auditorium of the Gallery's East Building, one of two visitors who were coming down the stairs, said, "Excuse me," in an attempt to get the appellant's attention but that the appellant kept climbing the stairs without acknowledging the visitor. The arbitrator stated that Bock testified that one of the visitors waved his hand in front of the appellant to again get his attention and asked where the Large Auditorium was located. The arbitrator stated that Bock further testified that the appellant continued climbing the stairs without acknowledging the visitors and without stopping and then, while continuing up the stairs, pointed in the direction of the Large Auditorium. The arbitrator noted the appellant's testimony that he could not recall the incident. He found Bock's testimony more credible than the appellant's on this issue because Bock's written statements and testimony on other matters in the grievance were essentially corroborated, Bock's supervisor held him in high regard, and there was no indication that Bock "was out to get" the appellant. The arbitrator found, on the other hand, that the appellant's "testimony was self-contradictory and not credible in other matters[.]" AD at 29-31.

The appellant contends that the arbitrator failed to afford him a fair hearing because the four reasons stated by the agency for its removal action were completely based on hearsay by Lindner and on the arbitrator's own thoughts as to what occurred. The appellant reargues the merits of the agency's reasons for its removal action, challenges the arbitrator's credibility and fact findings on the merits of those reasons, contends that the arbitrator erred by omitting testimony, and contends that the arbitrator failed to protect "potential witnesses" from

alleged agency retaliation. Request for Review at 2-4, 7-13. The appellant also contends that the arbitrator displayed bias by recharacterizing the agency's "charge of fighting, with his own charge of aggressive physical behavior" and by denying him a fair hearing. *Id*. at 2.

None of these contentions indicates that the arbitrator erred in interpreting civil service law, rule, or regulation, and, absent legal error, the Board cannot substitute its conclusions for the arbitrator's even if it would disagree with the arbitrator's findings. *See Colon*, 73 M.S.P.R. at 663. Further, the arbitrator's findings on the merits of the reasons for the agency's removal action are not in conflict with Board substantive law. *See Gomez*, 70 M.S.P.R. at 263. Moreover, the appellant's allegation of bias, which is based solely on his disagreement with the arbitrator's findings and rulings is insufficient to overcome the presumption of honesty and integrity that is accorded arbitrators. *See Colon*, 73 M.S.P.R. at 664-65.

The appellant has failed to prove discrimination based on national origin.

Here, in response to the Board's July 29, 1997 order, the appellant contends that he raised prohibited discrimination in the proceedings before the agency, in the negotiated grievance procedure, and in his request for review because his representative argued that he was described by the visitor in the July 22, 1995 incident as an "African American," when, in fact, he is a "Jamaican." He argues that he has therefore raised the issue of prohibited discrimination based on national origin. RFR File, Tab 5 at 1-2. The appellant has alleged no other facts to support his allegation of discrimination based on national origin other than his assertion that he was erroneously described as "African American." This bare assertion is insufficient to establish discrimination based on national origin. *See Colon*, 73 M.S.P.R. at 666. However, based on the above discussion, we have

provided the appellant with mixed-case appeal rights even though he made only a bare allegation that was insufficient to prove his discrimination claim.

The penalty of removal was reasonable.

The appellant contends that, in sustaining the penalty of removal, the arbitrator erred by not considering the issue of "disparate treatment." The appellant contends that the arbitrator erred by disallowing testimonial evidence, documentary evidence, and allegedly new and material evidence regarding the issue of disparate "treatment," i.e., that the agency failed to discipline other employees who had been involved in physical altercations. Request for Review at 4-6, 14. In his decision, the arbitrator rejected the appellant's proffer of allegedly new evidence of "disparate treatment," submitted with his post-hearing submissions because "[it] is a well-settled principle of arbitral law that no new evidence should be included with post-hearing submissions." AD at 13. We find no error of law in the arbitrator's refusal to consider the allegedly new and material evidence submitted after the hearing. *Cf., e.g.,* 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service,* 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

Here, in sustaining the removal penalty, the arbitrator considered the deciding official's testimony that he relied on the following penalty factors: The nature and gravity of the appellant's offenses; the unfavorable image of the agency that the appellant portrayed to visitors; the appellant's lack of judgment, in relation to his position as a Guard, in fighting and using threatening language; the adverse effect of the appellant's fighting and his threatening remarks on workplace morale and on the safety of both Gallery employees and visitors; the fact that the appellant had recently received, on July 7, 1995, a letter of reprimand for

threatening another Guard; and the fact that the penalty of removal was consistent with the agency's table of penalties for the sustained offenses. Based on this testimony, the arbitrator found that removal was for "just cause" and promoted the efficiency of the service. AD at 31-33, 37. We do not find that the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. *Benson*, 65 M.S.P.R. at 554; *Hayes*, 65 M.S.P.R. at 217; *Bean*, 55 M.S.P.R. at 612.

Accordingly, we find no basis to modify or to set aside the arbitration decision.

ORDER

This is the final order of the Merit Systems Protection Board in this request for review. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.

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DISSENTING OPINION OF SUSANNE T. MARSHALL, MEMBER

Trevor Bennett v. National Gallery of Art
Docket No. CB-7121-97-0040-V-1

Notwithstanding the appellant's claim that he raised the issue of discrimination in response to the agency's notice of proposed removal, the appellant, in fact, has not made an allegation of discrimination based on his race or national origin which would give the Board jurisdiction to review the arbitrator's decision under 5 U.S.C. § 7121(d). In arguing that the Board has jurisdiction over his appeal, the appellant claimed that he raised the issue of discrimination when he responded to the agency's notice of proposed removal. He did so, he indicated, because the National Gallery visitor who accused him of rudeness, one of the reasons for the agency's action, had described him as "African-American" while he "maintains that he is Jamaican." Appeal File, Tab 5.

This reference to the appellant's national origin arises from the physical description provided by the visitor to the Gallery who witnessed certain conduct. Appeal File, Tab 3, Subtab 18. Other than this reference, there is no statement in the record which could reasonably be construed as an "allegation of discrimination," much less a claim that the appellant was discriminated against by the agency. The purported misidentification might be relevant to a claim of mistaken identity but is not germane to the issue of whether the agency discriminated against the appellant. More importantly, even if it could be argued that the statement was

discriminatory, the visitor made the statement to describe the Gallery guard who allegedly was rude to her; the agency, the employer, did not, and neither did a fellow employee. Appeal File, Tab 3, Subtab 19.

The appellant has made no claim that his removal resulted from or was *based on* his national origin, or any other act of discrimination. There is not even a "bare claim" that the agency engaged in a prohibited personnel practice, proscribed by 5 U.S.C. Section 2302(b)(1), in that it discriminated against this employee on the basis of his national origin. The appellant therefore has not met the minimum requirement, even under *Colon,* of a "bare claim" of discrimination. *Colon v. Department of Veterans Affairs,* 73 M.S.P.R. 659, 666 (1997).

There must be some nexus between the appellant's national origin and the personnel action taken here, i.e., his removal for misconduct. There is none. Even under the most liberal reading of this case, simply using the term "discrimination," without any allegation that the actions of the employer were somehow based on that discrimination, does not set forth a claim of discrimination which would trigger Board jurisdiction, under 5 U.S.C. § 7121(d) to review the arbitrator's final decision. For these reasons, I would find that the Board lacks jurisdiction over this appeal and that the appellant is not entitled to receive notice of mixed-case review rights.

For the above reasons, I respectfully dissent.

JUL 28, 1998
Date

(signed)
Susanne T. Marshall
Member